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**Attorneys for Plaintiffs**

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF OREGON**

VANGUARD PRODUCTS GROUP, INC.

an Illinois corporation and TELEFONIX,

INC., an Illinois corporation,

Case No. 3:07-CV-1405 BR

Plaintiffs,

v.

MERCHANDISING TECHNOLOGIES,

INC. an Oregon corporation,

Defendant.

**PLAINTIFFS' REPLY IN SUPPORT  
OF MOTION TO EXCLUDE  
UNTIMELY DISCLOSURES OR NEW  
DEFENSES**

Plaintiffs' motion presents a straightforward question: Does MTI's "35 USC 282 Disclosure" include new defenses or new disclosures of prior art? If so, those disclosures are untimely. Unfortunately, MTI does not give a straightforward answer, and for good reason.

On May 6, 2008, pursuant to the Court's scheduling order, MTI identified more than 3,900 pages of documents upon which it would rely to support its invalidity defenses.<sup>1</sup> Despite its "everything-but-the-kitchen-sink" approach to its disclosure obligations, it is clear that at least the following items from MTI's "35 USC 282 Disclosure" were not included in its May 6, 2008, invalidity disclosures:

00/00/91	Se-Kure Promotional material	MTI006479-6480			
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08/30/99	Fax of Wal Mart installation instructions	MTI016602-6606			
11/16/99	Telefonix sensor projects with marginalia	MTI010681-0683			
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02/02/01	MTI promotional material	MTI001080			
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11/01/02	Wal-Mart camcorder security display prototype product installation and operation guide for MTI	DEX 14, Kelsch			
11/19/02	Telefonix quality manual revision 4.0.	DEX 20 Burke			
04/00/03	MTI product manual Target: Security and merchandising display for camcorders and cameras	DEX 16 Kelsch			
05/27/03	MTI brand smart USA CE hand-held proposal contents	DEX 15 Kelsch			
05/00/03	MTI product line manual Freedom hand-held consumer electronics merchandising display	DEX 17 Kelsch			
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<sup>1</sup> MTI disclosed its invalidity contentions on May 6, 2008. In its invalidity contentions, MTI incorporated by reference its entire prior art disclosure made on March 17, 2008, which identified more than 3,900 pages of alleged prior art references.

Not dated	MTI interactive display Promotional material	MTI001704-1082			
***					
Not dated	Freedom CEHH merchandising system product overview	MTI028493-8509			
***					
Not dated	Control module connections and settings diagram	MTI000206			
***					
Not dated	Se-Kure Catalog No. 190	MTI014960-4983			
Not dated	Se-Kure Catalog No. 194	MTI015138-5169			
***					
Not dated	Se-Kure Catalog No. 894	MTI014985-5016			
***					
Not dated	Se-Kure Circuit City training	MTI005831			

Accordingly, these disclosures are untimely by many months, and MTI should not be allowed to use the above-listed documents or any other documents not identified in the May 6, 2008, disclosure to support its invalidity defenses.

Moreover, MTI does not explain how the following disclosure—made for the first time in the “35 USC 282 Disclosure”—does not relate to a defense of anticipation:

In addition to the items previously disclosed, MTI provides notice that the following witnesses may be relied upon as the prior inventor or as having prior knowledge of or as having previously used or offered for sale the invention of the patent in suit.

The disclosure tracks almost exactly the language of Section 102(a), which sets forth the defense of anticipation:

A person shall be entitled to a patent unless -  
 (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent . . . .

35 U.S.C. § 102(a). In light of this similarity and MTI's confusing discussion of anticipation and Mr. Leyden's '807 patent, plaintiffs can only interpret the "35 USC 282 Disclosure" as an effort by MTI to leave the door open to make some sort of anticipation argument. MTI says "there is no defense of 'anticipation,' as that defense is commonly understood, and MTI is not proposing it now." MTI Opp. at 3. The defense of anticipation is not available to MTI at trial, whether it is the "commonly understood" defense or some attempt to formulate a quasi-anticipation defense. If MTI truly has abandoned its anticipation defense, the subject matter of this disclosure (and the testimony proposed therein) is irrelevant in addition to being untimely.

Plaintiffs' motion is not confusing. It presents a clear-cut issue. MTI's invalidity contentions and disclosures were due May 6, 2008, and MTI should not be allowed to now expand those disclosures. Accordingly, the only possible proper purpose of MTI's "35 USC 282 Disclosure" would be to narrow MTI's prior disclosures—which it patently does not do. That ends the inquiry. MTI should not be allowed to rely on its last-minute disclosure to justify admissibility of any prior art at trial.

Plaintiffs' motion should be granted.

DATED this 4th day of May, 2009.

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